

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DEBRA VANESSA WHITE,

Plaintiff,

v.

RELAY RESOURCES and GENERAL
SERVICES ADMINISTRATION,

Defendants.

CASE NO. C19-0284-JCC

ORDER

This matter comes before the Court on Defendants General Services Administration (“GSA”), Emily Murphy, and the United States’ (collectively the “Government Defendants”) motion to dismiss (Dkt. No. 53). Having considered the parties’ briefing and the relevant record, the Court STRIKES the claims against the Government Defendants in Plaintiff’s amended complaint (Dkt. No. 47) and DENIES the Government Defendants’ motion to dismiss as moot.

I. BACKGROUND

The Court previously set forth the underlying facts of this case and will not repeat them here. (*See* Dkt. No. 40 at 1–3.) On July 9, 2019, the Court dismissed all of Plaintiff’s claims against GSA. (*See* Dkt. No. 41.) In doing so, the Court granted Plaintiff leave to amend her breach of contract claim to allege, if she could, facts establishing (1) that a contract existed between Plaintiff and GSA; (2) the specific provisions which imposed a duty on GSA; and (3)

1 how GSA breached the contract. (*See id.* at 7.) Plaintiff subsequently filed an amended
2 complaint, but she did not amend her breach of contract claim. (*See* Dkt. No. 47.) Instead,
3 Plaintiff added Emily Murphy, the Administrator of GSA, and the United States as defendants
4 and asserted 10 new claims against the Government Defendants.¹ Those defendants now move to
5 dismiss Plaintiff’s new claims on the grounds that (1) Plaintiff did not comply with the Court’s
6 July 9 order, (*see* Dkt. No. 53 at 9), and (2) the amended complaint fails to state a claim for
7 which relief can be granted, (*see id.* at 9–19).

8 **II. DISCUSSION**

9 **A. Plaintiff’s Compliance with the Court’s Order**

10 The Government Defendants construe the Court’s July 9 order as allowing Plaintiff to
11 amend only her breach of contract claim and prohibiting her from adding additional claims. This
12 construction is erroneous. (*See id.* at 9.) The Court’s July 9 order explained what Plaintiff had to
13 do to amend her breach of contract claim; it did not limit Plaintiff’s ability under Federal Rule of
14 Civil Procedure 15(a) to seek to amend her complaint by adding new claims. *See Geier v. Mo.*
15 *Ethics Comm’n*, 715 F.3d 674, 677 (8th Cir. 2013) (quoting *Whitaker v. City of Houston*, 963
16 F.2d 831, 835 (5th Cir. 1992)) (holding that a party may amend under Rule 15(a) unless an order
17 “expressly or by clear implication dismiss[es] the action”); (Dkt. No. 41 at 7). The only order
18 relevant to Plaintiff’s ability to add new claims is the Court’s minute entry on July 6, 2019,
19 which provides that pleading amendments are due by November 8, 2019. (*See* Dkt. No. 45 at 1.)
20 That deadline has not yet passed.

21 Although the Court’s July 9 order does not prohibit Plaintiff from amending her
22 complaint under Rule 15(a), she still must comply with the Rules’ requirements before doing so.

24 ¹ It is, in fact, unclear whether Plaintiff brings claims against the United States. The caption to
25 the amended complaint includes “UNITED STATES OF AMERICA (HEAD OF GSA),” but the
26 body of the complaint does not list the United States as one of the parties. (*See* Dkt. No. 47 at 1–
3.) However, the Court’s analysis of Plaintiff’s new claims is the same regardless of whether the
United States is named as a defendant.

1 Rule 15(a)(1) allows a plaintiff to amend a complaint “once as a matter of course”—*i.e.*, without
2 the court’s approval—within (1) 21 days after the plaintiff serves the complaint or (2) 21 days
3 after the defendant serves a motion under Rule 12(b), (e), or (f), whichever is earlier. If the
4 plaintiff can no longer amend their complaint as a “matter of course,” then they “may amend
5 [their] [complaint] *only* with the opposing party’s written consent or the court’s leave.” Fed. R.
6 Civ. P. 15(a)(2) (emphasis added). To seek the court’s leave, a party must file a motion. Fed. R.
7 Civ. P. 7(b)(1).

8 Plaintiff appears to have violated Rules 7(b)(1) and 15(a) when she amended her
9 complaint to add 10 new claims. Plaintiff could not amend her complaint as a matter of course
10 because Defendant Relay Resources filed a motion to dismiss Plaintiff’s original complaint on
11 April 29, 2019—93 days before Plaintiff filed her amended complaint. (*See* Dkt. Nos. 15, 47.) In
12 addition, the Court’s July 9 order granted Plaintiff leave to amend only as to her contract claim;
13 it did not give her permission to add 10 entirely new claims. (*See* Dkt. No. 41 at 7.) Accordingly,
14 if Plaintiff wished to amend her complaint to add new claims, then Rules 7(b)(1) and 15(a)(2)
15 required that she obtain Defendants’ written consent or file a motion requesting leave from the
16 Court. Plaintiff did neither.

17 Plaintiff’s failure to formally seek leave to amend her complaint leaves the Court caught
18 between two competing principles. On the one hand, “*pro se* parties are held to the same
19 procedural requirements as represented parties.” *Steward v. Emerald Corr. Mgmt., LLC*, 2014
20 WL 12798369, slip op. at 3 (D.N.M. 2014) (citing *DiCesare v. Stuart*, 12 F.3d 973, 979 (10th
21 Cir. 1993)). On the other hand, courts “ha[ve] a duty to ensure that *pro se* litigants do not lose
22 their right to a hearing on the merits . . . due to ignorance of technical procedural requirements.”
23 *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1988). To reconcile these
24 principles, “[d]istrict courts have liberally construed an amended complaint, that was filed
25 without leave of court, as a motion for leave to amend the complaint.” *Levy v. FCI Lender Servs.,*
26 *Inc.*, 2019 WL 3459030, slip op. at 2 (S.D. Cal. 2019) (citing *Baker v. G.D. Lewis*, 2012 WL

1 1932867, slip op. at 1 (N.D. Cal. 2012); *Miller v. LaMontagne*, 2011 WL 7379862, slip op. at 1
2 (S.D. Cal. 2011); *Dauven v. George Fox Univ.*, 2010 WL 6089077, slip op. at 24 (D. Or. 2010));
3 *see also Wennihan v. AHCCCS*, 515 F. Supp. 2d 1040, 1043–44 (D. Ariz. 2005); *Hardrick v.*
4 *Werner Enterprises, Inc.*, 2005 WL 8154641, slip op. at 3 (N.D. Ga. 2005). While courts do not
5 universally follow this approach, *see, e.g., Battles v. Wash. Metro. Area Transit Auth.*, 272 F.
6 Supp. 3d 5, 12 (D.D.C. 2017) (striking amended complaint because *pro se* plaintiff failed to seek
7 the court’s permission before filing the complaint), the Court finds the approach appropriate in
8 this case. Construing Plaintiff’s amended complaint as a motion for leave to amend will not
9 prejudice any party given that the parties have fully briefed the merits of Plaintiff’s new claims.
10 (*See* Dkt. Nos. 52–54, 56, 59, 66, 68, 70, 75.) In addition, forcing Plaintiff to formally seek leave
11 to file an amended complaint would simply result in the parties duplicating their previous
12 briefing.

13 Because the Court construes Plaintiff’s amended complaint as a motion for leave to
14 amend, the Court must analyze Plaintiff’s implied “motion” under Rule 15(a) instead of Rule
15 12(b). Rule 15(a)(2) states that “[the] court should freely give leave when justice so requires.”
16 However, leave “need not be granted where the proposed amendment is futile.” *Nordyke v. King*,
17 644 F.3d 776, 788 n.12 (9th Cir. 2011). A proposed amendment is futile if it would be “subject
18 to dismissal.” *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1298 (9th Cir. 1998). The test for
19 whether a proposed amendment is futile is, therefore, identical to the test for whether a pleading
20 survives a challenge under Rule 12(b)(1) or (6).² *See Nordyke*, 644 at 788 n.12 (citing *Miller v.*
21 *Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988)). Accordingly, Plaintiff must establish that
22 the Court has subject matter jurisdiction over each of her new claims. *Stock West, Inc. v.*
23 *Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989). Plaintiff must also allege sufficient
24 facts, accepted as true, to state a claim for relief that is plausible on its face. *Ashcroft v. Iqbal*,

25 _____
26 ² Given that the tests are identical, the Court will treat the Government Defendants’ arguments
under 12(b)(1) and (6) as arguments for why Plaintiff’s proposed amendments are futile.

1 556 U.S. 662, 677–78 (2009). A claim has facial plausibility when a plaintiff pleads factual
2 content that allows the court to draw the reasonable inference that the defendant is liable for the
3 misconduct alleged. *Id.* at 678.

4 **B. The Merits of Plaintiff’s New Claims**

5 Plaintiff proposes to add 10 claims against the Government Defendants. For the reasons
6 explained below, the Court finds that those claims are futile.

7 1. Count I

8 In Count I, Plaintiff brings a claim under 18 U.S.C. § 371 for “Defrauding the United
9 States.” (*See* Dkt. No. 47 at 8.) It is unclear, however, how the Government Defendants allegedly
10 defrauded the United States; Plaintiff’s factual allegations relate only to her inability to “use the
11 computer” or access other information. (*See id.*) More importantly, 18 U.S.C. § 371 “do[es] not
12 provide for a private right of action.” *Henry v. Universal Tech. Inst.*, 559 Fed. App’x 648, 650
13 (9th Cir. 2014). Count I therefore fails to state a claim.

14 2. Count II

15 For Count II, Plaintiff brings a claim under 18 U.S.C. Chapter 47. Chapter 47, like the
16 rest of the United States Criminal Code, “provide[s] no basis for civil liability.” *See Aldabe v.*
17 *Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980). Accordingly, Count II fails to state a claim.

18 3. Count III

19 Count III appears to be a due process claim. Plaintiff alleges that the Government
20 Defendants violated her “liberty to work” by “treating [her] as if she is a criminal . . . and
21 requir[ing] [her] to provide an opportunity to appeal to EEOC and GSA EEO to explain her side
22 of the story.” (*See* Dkt. No. 47 at 9.) However, even assuming that these acts violated Plaintiff’s
23 protected interests, Plaintiff cannot bring a due process claim against a federal agency under
24 either *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971),
25 or the Federal Tort Claims Act, 28 U.S.C. § 1346, *et seq.* *See FDIC v. Meyer*, 510 U.S. 471,
26 485–86 (1994) (“An extension of *Bivens* to agencies of the Federal Government is not supported

1 by the logic of *Bivens* itself.”); *Cato v. United States*, 70 F.3d 1103, 1111 (9th Cir. 1995)
2 (quoting *United States v. Meyer*, 510 U.S. 471, 478 (1994)) (“[T]he United States simply has not
3 rendered itself liable under [the FTCA] for constitutional tort claims.”). In addition, Plaintiff
4 does not allege that Ms. Murphy took any specific acts that violated Plaintiff’s due process
5 rights. (See Dkt. No. 47 at 9.) Accordingly, Count III fails to state a claim against the
6 Government Defendants. See *Iqbal*, 556 U.S. at 676 (“[A] plaintiff must plead that each
7 Government-official defendant, through the official’s own individual actions, has violated the
8 Constitution.”).

9 4. Count IV

10 Count IV is a claim for “Violation of the Wagner Act Known as the National Labor
11 Relations Act of (1935).” (Dkt. No. 47 at 9–10.) The National Labor Relations Board has
12 exclusive jurisdiction over claims brought under the NLRA for unfair labor practices by
13 employers. *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 108 (1989). Count
14 IV therefore fails to state a claim over which the Court has jurisdiction.

15 5. Count V

16 In Count V, Plaintiff alleges that the Government Defendants violated Title VII by
17 refusing to enter into a contract with Plaintiff because of her “deaf accent.” (See Dkt. No. 47 at
18 10.) But as previously explained in the Court’s July 9 order, Title VII requires a plaintiff to
19 exhaust her administrative remedies by (1) filing a pre-complaint within 45 days of the alleged
20 discriminatory behavior; (2) filing a formal complaint with the agency alleged to have
21 participated in the discrimination; and (3) receiving notice of a final agency decision from the
22 agency or an administrative law judge. (See Dkt. No. 41 at 4) (citing *Vinieratos v. U.S. Dep’t of*
23 *Air Force through Aldridge*, 939 F.2d 762, 768 (9th Cir. 1991)). Plaintiff has still not alleged
24 facts sufficient to show that she has exhausted her administrative remedies. (See Dkt. No. 47 at
25 10.) Thus, Count V does not state a claim for which the Court can grant relief.
26

1 6. Count VI

2 Count VI is a restatement of Plaintiff's disability discrimination claim from her original
3 complaint. (*Compare* Dkt. No. 47 at 10–11, *with* Dkt. No. 3 at 12–16.) The Court dismissed that
4 claim with prejudice because Plaintiff's claim under the Americans with Disabilities Act, 42
5 U.S.C. § 12101, *et seq.*, is pre-empted by the Rehabilitation Act of 1973, 28 U.S.C. § 701, *et*
6 *seq.* (*See* Dkt. No. 41 at 3) (citing *Johnston v. Horne*, 875 F.2d 1415, 1418–19 (9th Cir. 1989)).
7 Because the Court dismissed that claim with prejudice, Plaintiff is barred from it again.

8 7. Count VII

9 For Count VII, Plaintiff cites 29 C.F.R. § 1606.7, appears to allege that GSA required her
10 to “Speak English” (as opposed to sign language), and concludes that this is why the agency
11 refused to enter into a contract with her. (*See* Dkt. No. 47 at 11–12.) These allegations are
12 identical to the allegations in Counts V and VI, (*see id.* at 10–11), which fail to state a claim for
13 which the Court can grant relief. Moreover, § 1606.7 does not create a private cause of action
14 that would allow Plaintiff to get around the defects in Counts V and VI. Section 1606.7, like all
15 Equal Employment Opportunity Commission guidelines, does not have the force of law; it
16 merely reflects “a body of experience and informed judgment to which courts and litigants may
17 properly resort for guidance.” *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 141–42 (1976); *see also*
18 *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975).

19 8. Count VIII

20 Plaintiff labels Count VIII “Negligence/Misrepresentation.” (*See* Dkt. No. 47 at 12.) To
21 the extent that Count VIII alleges a tort claim, the Court lacks subject matter jurisdiction over the
22 claim because Plaintiff did not present a formal claim to GSA's Office of General Counsel. (*See*
23 Dkt. No. 41 at 5.) In addition, “[t]he United States has not waived its sovereign immunity with
24 respect to fraud and negligent misrepresentation claims.” *West v. City of Mesa*, 708 Fed. App'x
25 288, 291 (9th Cir. 2017) (citing *Pauly v. USDA*, 348 F.3d 1143, 1151–52 (9th Cir. 2003)).
26 Plaintiff cannot, therefore, bring a claim for negligence/misrepresentation against the

1 Government Defendants in this Court.

2 9. Count IX

3 Count IX purports to be a claim under the Racketeer Influenced and Corrupt
4 Organization Act, 18 U.S.C. §§ 1961–1968. However, civil RICO actions cannot be brought
5 against federal agencies or federal employees sued in their official capacities. *See Lancaster*
6 *Cnty. Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397, 404 (9th Cir. 1997) (dismissing RICO
7 claims against a state hospital “because government entities are incapable of forming a malicious
8 intent”); *Berger v. Pierce*, 933 F.2d 393, 397 (6th Cir. 1991) (concluding that the federal
9 government cannot engage in “racketeering activity” because it cannot be “charged,” “indicted,”
10 or “punished” for violations of state and federal criminal provisions); *United States v. Bonanno*
11 *Org. Crime Family of La Cosa Nostra*, 879 F.2d 20, 23–27 (2d Cir. 1989) (observing that RICO
12 lacks an “unequivocal expression of congressional intent to expose the government to RICO
13 liability”). Consequently, Count IX fails to state a claim against GSA or Ms. Murphy in her
14 official capacity.

15 Count IX also fails to state a claim against Ms. Murphy in her individual capacity. To
16 state a claim under RICO, a plaintiff must allege “one or more defendant ‘persons’ conducted or
17 participated in the activities of an ‘enterprise’ through a pattern of racketeering activity
18 consisting of at least two predicate acts cognizable under RICO.” *Capitol West Appraisals, LLC*
19 *v. Countrywide Fin. Corp.*, 759 F. Supp. 2d 1267, 1272 (W.D. Wash. 2010). These allegations
20 must be made “with particularity” and must include “‘the who, what, when, where, and how,’ of
21 the misconduct charged.” *See id.* at 1271 (quoting *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d
22 1097, 1104–05 (9th Cir. 2003)). Count IX, however, does not state with particularity the
23 wrongful acts that Ms. Murphy engaged in. Count IX instead begins with an unclear statement
24 about “Defendants[’]” efforts to “manipulate the legal system.” (*See* Dkt. No. 47 at 13–14.) It
25 then asserts that “Defendants have actively sought to hamper government anti-extremists by
26 direct propaganda.” (*See id.*) Finally, Count IX ends by listing provisions of the United States

1 Code that Defendants have allegedly violated. (*See id.*) These allegations do not satisfy the
2 pleading standard for a civil RICO claim. *See Capitol West Appraisals*, 759 F. Supp. 2d at 1271–
3 72.

4 10. Count X

5 Count X is titled “Americans with Disability Notification Act of 2011.” (*See* Dkt. No. 47
6 at 14.) “[T]he ADA Notification Act has been introduced multiple times . . . [but it] never
7 became law.” *Raetano v. Kally K’s, Inc.*, 2009 WL 651808, slip op. at 7 n.3 (M.D. Fla. 2009).
8 The Act cannot, therefore, provide the basis for any claim in this case.

9 **III. CONCLUSION**

10 For the foregoing reasons, the Court concludes that it would be futile for Plaintiff to
11 amend her complaint to add claims against the Government Defendants. The Court therefore
12 DENIES Plaintiff leave to amend and STRIKES the claims against the Government Defendants
13 that she has raised in her amended complaint (Dkt. No. 47). The Court also DENIES the
14 Government Defendants’ motion to dismiss (Dkt. No. 53) as moot. Finally, the Court
15 DISMISSES the Government Defendants—GSA, Ms. Murphy, and the United States—from the
16 case.

17 DATED this 31st day of October 2019.

18
19
20
21
22
23
24
25
26



John C. Coughenour
UNITED STATES DISTRICT JUDGE